

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

* * * * *

WILLIAM WHITFORD, ROGER ALCLAM,
EMILY BUNTING, MARY LYNNE DONOHUE,
HELEN HARRIS, WAYNE JENSEN, WENDY
SUE JOHNSON, JANET MITCHELL, ALLISON
SEATON, JAMES SEATON, JEROME
WALLACE, and DONALD WINTER,

Plaintiffs,

-vs-

Case No. 15-CV-421-BBC

GERALD NICHOL, THOMAS BARLAND, Madison, Wisconsin
JOHN FRANKE, HAROLD FROEHLICH, November 4, 2015
KEVIN KENNEDY, ELSA LAMELAS, 1:33 p.m.
and TIMOTHY VOCKE,

Defendants.

* * * * *

STENOGRAPHIC TRANSCRIPT OF MOTION HEARING
HELD BEFORE HONORABLE JUDGE KENNETH RIPPLE,
HONORABLE JUDGE BARBARA B. CRABB
and HONORABLE JUDGE WILLIAM GRIESBACH

APPEARANCES:

For the Plaintiff:

University of Chicago Law School
BY: NICHOLAS STEPHANOPOULOU
1111 E. 60th Street, Ste. 510
Chicago, Illinois 60637

Mayer & Brown LLP
BY: MICHELE ODORIZZI
71 South Wacker Drive
Chicago, Illinois 60606

Lynette Swenson RMR, CRR, CBC
U.S. District Court Federal Reporter
United States District Court
120 North Henry Street, Rm. 520
Madison, Wisconsin 53703

608-255-3821

For the Defendant:

Department of Justice
BY: BRIAN KEENAN
ANTHONY RUSSOMANNO
17 East Main Street
Madison, Wisconsin 53703

* * * * *

(Proceedings called to order.)

THE CLERK: Case Number 15-CV-421-BBC. *William Whitford, et al. v. Gerald Nichols, et al.* Court is called for oral argument. May we have the appearances, please.

MR. KEENAN: For the defendants, Assistant Attorneys General Brian Keenan and Anthony Russomanno.

MS. ODORIZZI: For the plaintiffs, Michele Odorizzi and Nicholas Stephanopoulou.

JUDGE RIPPLE: We'll be hearing oral argument on the motion to dismiss today and we've allotted 30 minutes to each side. And we'll hear from the moving party first and then from the responding party on the motion. If the moving party would like to reserve any time for rebuttal, if you'd please let the court clerk know that at the beginning, we'd appreciate it.

MR. KEENAN: I'll just reserve five minutes rebuttal.

JUDGE RIPPLE: Thank you, Counsel. Counsel,

1 the podium is yours.

2 MR. KEENAN: May it please the Court. The
3 Court should dismiss this case because the plaintiffs do
4 not state a claim on which relief can be granted. The
5 Supreme Court has rejected partisan gerrymandering
6 claims in *Vieth v. Jubelirer*. A plurality found or held
7 that they would be nonjusticiable political questions.
8 While Justice Kennedy wasn't willing to go that far, he
9 did dismiss the case in front of him -- the *Vieth* court
10 based on the failure to state a claim. The reasoning
11 was that the plaintiffs in that case had not put forward
12 a judicially discernible standard that was tied to an
13 actual constitutional violation and the weaknesses that
14 plagued the *Vieth* plaintiffs' standard are also present
15 here.

16 The plaintiffs offered a standard based on what
17 they called the *efficiency gap*, the difference between
18 the parties' ability to translate the total statewide
19 votes for their candidates into legislative seats. They
20 say that there's a constitutional right for both major
21 political parties to be able to translate their
22 statewide support into legislative seats with equal
23 ease; however, there just is no such constitutional
24 right. The *Vieth* court addressed a similar proposition
25 from their plaintiffs and said that the Constitution

1 guarantees equal protection of the laws, not equal
2 representation in the government for equivalent-size
3 groups.

4 JUDGE RIPPLE: How does this case differ
5 significantly from *Vieth* --

6 MR. KEENAN: Well --

7 JUDGE RIPPLE: -- on the facts?

8 MR. KEENAN: On the facts, I'm not sure that it
9 differs a lot. In *Vieth*, there was also the contention
10 that a minority of voters -- that dealt with the
11 Pennsylvania congressional districts -- would be able to
12 enact a majority or elect a majority of congressional
13 seats. Here the allegation is the same, that the
14 Democrats secured a majority of the statewide
15 legislative vote in 2012. I don't think they've proven
16 that for 2014 or even alleged that for 2014. But yet
17 we're only able to get 39 percent of the seats. I think
18 it may differ in the manner of degree of the difference
19 between the seats and the votes, but essentially it's
20 the same problem, same difference. In fact, all
21 gerrymandering claims are based on this essential
22 contention that the system is unfair in that it's
23 weighted to favor one party or the other; that one party
24 is going to get more seats with the same amount of
25 votes.

1 JUDGE RIPPLE: This may seem like a very simple
2 question, but I guess it's usually the first question
3 you usually ask on a motion to dismiss. From your
4 perspective, what are the elements of the cause of
5 action here?

6 MR. KEENAN: Well, this is a unique case in
7 that I don't think there are any elements of a cause of
8 action in that the Supreme Court by Justice Kennedy has
9 left it up to plaintiffs in cases to devise a workable
10 standard for these claims. So I don't see that there
11 are elements. The plaintiffs have offered what they
12 consider to be a test and our argument is more along the
13 lines of that test --

14 JUDGE RIPPLE: But does that go to the elements
15 of the cause of action or really to the quantum of
16 proof, how one proves up those elements?

17 MR. KEENAN: I think it's both. They're trying
18 to equate the cause of action with a quantum of proof;
19 that the cause of action only begins to exist once the
20 efficiency gap grows to a certain number, which they say
21 is 7 percent, but perhaps might be some other number,
22 which is kind of the opposite of what the one-person,
23 one-vote cases they rely on did which was develop what
24 the theory and the elements would be and then arrive at
25 a numerical test where you can judge that.

1 While the plaintiffs deny it, their standard does
2 rest upon the principle that groups have a right to
3 proportional representation. What they're saying is
4 wrong about the Wisconsin system is that it's -- what's
5 wrong is that the Democrats got 51 percent of the vote;
6 only get 39 percent of the seats. Their strength in the
7 legislature isn't in proportion to their number of
8 statewide votes.

9 THE COURT: This raises a question of concern I
10 think to all of us and that is the named plaintiffs here
11 are residents of only certain districts; is that right?

12 MR. KEENAN: Yes. And the Complaint lays them
13 out and we laid them out in our motion to dismiss. I
14 believe there's like six, seven, eight districts that
15 they're --

16 THE COURT: How would these people have
17 standing to object to the statewide districting?

18 MR. KEENAN: Yeah. And we've raised that
19 argument that our contention is they don't, because even
20 in the *Vieth* dissents, for example, I think it's Justice
21 Souter's dissent, wanted a district-by-district
22 challenge where you'd only have standing to challenge
23 your own district. That's the rule that applies in the
24 racial gerrymandering context and really doesn't seem
25 why there would be a different reason to apply a

1 different rule here.

2 And it also speaks to the difficulty of this type
3 of claim in that, for example, if someone in District 8
4 is unhappy with their district and that district gets
5 redrawn, well, that may necessitate redrawing districts
6 all across the state in which once you start changing,
7 there's a ripple effect all over the state. And so
8 whose constitutional rights are at issue? It's almost
9 everyone in the whole state's interest is at issue and
10 that someone in Fond du Lac may like their
11 representative the way it is, but now they have to be
12 changed. And they've now been either packed or cracked,
13 whichever way, because they're kind of flip sides of the
14 same coin. Every time you crack a Democrat, you pack a
15 Republican, et cetera. And really the challenge to the
16 statewide map just isn't feasible.

17 I would just like to clarify the plaintiffs say
18 that their standard isn't based on proportional
19 representation because it recognizes that, for example,
20 a party might get 55 percent of the seats and 60 percent
21 of the vote and that would be acceptable because that's
22 sometimes what happens in an election is that several
23 close seats swing one way or the other. So you can get
24 a bump, kind of. But at the same time, the underlying
25 principle is still proportional representation.

1 The *Vieth* courts mention a proportional
2 representation wasn't about strict proportion but just a
3 correlation between the numerical strength and seats in
4 the legislature.

5 JUDGE RIPPLE: What differences do you see, if
6 any, between the proportional representation approach
7 and the approach which your colleagues on the other side
8 are suggesting here?

9 MR. KEENAN: Well, I think the main difference
10 is that -- at least the way Professor Jackman, who is
11 one of the experts that they've submitted a report
12 from -- the way he measures the efficiency gap measured
13 a difference in the statewide vote share to the seat
14 chair based on, like, this hypothetical seats-to-votes
15 curve, what you should have got. So a party, you know,
16 should, with 55 percent, should get 60 percent. Well,
17 the Democrats here got 50 but only got 45, so it's a 15
18 percent gap or that's basically the model of the way it
19 works.

20 So in that sense, I would say the only difference
21 is that they're accepting that proportional isn't
22 necessarily strictly 55 to 55, it's measuring it based
23 off of 55. Instead of using the vote total, they're
24 using like what the expected seat total would be. So
25 like 60 percent. But in essence, it's the same thing,

1 it's just using a different baseline as to what the
2 seats should be gained from a certain vote share.

3 JUDGE CRABB: Do you take the position that
4 there's no limit to the amount of gerrymandering
5 redistricting that can be done for partisan reasons? Is
6 it a constitutional problem?

7 MR. KEENAN: Our position is that there is no
8 judicially manageable standard to determine where you
9 end up crossing the line, so that you wouldn't really
10 know what is too much gerrymandering and
11 unconstitutional gerrymandering and what is the
12 appropriate amount, what is enough. And even aside from
13 that though, the plaintiffs, even if there was some
14 hypothetical standard, the plaintiffs haven't offered it
15 in this case in that -- yeah.

16 JUDGE CRABB: I understand that's one of your
17 positions, but I'm just wondering is there -- would you
18 ever see a possibility that the gerrymandering would be
19 so severe that it would create a constitutional problem?

20 MR. KEENAN: I have a difficult time imagining
21 how you would separate that from something else, just
22 given the number of variables at issue in all these
23 decisions and the different political make-ups of the
24 states, the concentration of voters. Each state is a
25 little bit different in that matter where, for example,

1 something might be a really bad gerrymander but end up
2 looking so bad under certain tests. But something might
3 not be a gerrymander and look like a gerrymander. For
4 example, the 2000s plan in Wisconsin comes out as a
5 gerrymander under the plaintiffs' test even though three
6 judges drew that plan, obviously not as some sort of
7 unconstitutional way to hurt the Democrats.

8 So I think it would be difficult to come up with a
9 standard that judges partisan gerrymander across all
10 states and also across time periods as well.

11 JUDGE GRIESBACH: Do you agree that the
12 districts -- the manner in which the districts were
13 drawn in this case is significantly different than the
14 manner in which they were drawn in previous
15 redistricting?

16 MR. KEENAN: The manner, do you mean the shape
17 of the districts or the process that was --

18 JUDGE GRIESBACH: The process described in the
19 plaintiffs' Complaint.

20 MR. KEENAN: Yes, the process is different from
21 previous redistrictings because they were all done by
22 courts. The political branches cannot agree and this
23 was done by the Legislature and the Governor and --

24 JUDGE GRIESBACH: The legislative branches have
25 never agreed in all of the prior -- as far back as 1990,

1 I guess it was.

2 MR. KEENAN: Yeah, I believe in 1980 as well.
3 It may also have been a court-drawn plan. I'm not sure
4 of the 80's, but at least the 90's and the 2000's.

5 I'd like to just address the intent element that's
6 part of the plaintiffs' test. We didn't spend a lot of
7 time briefing this because to the extent that the
8 intent -- all the intent element does is ask whether the
9 partisan body that entered -- whether the body that
10 entered the plan intended the result that it would
11 benefit that party, I think it will always be met by any
12 districting done by a certain party. The *Davis v.*
13 *Bandemer* court said that they would assume that
14 politicians would know the political results of what
15 they do and that you could basically assume the intent.
16 So if it's that minimal level of intent, that's almost
17 meaningless. It has to arise to a higher level of
18 intent, to some sort of predominant intent. The *Vieth*
19 court rejected such a test because it's just impossible
20 to determine, to pierce out intent in the legislative
21 body when there's so many other factors going on in
22 which some of the lines aren't drawn for partisan
23 intent, they're drawn to comply with the Voting Rights
24 Act or to keep communities of interest together, things
25 like that.

1 In addition to being -- not being judicially
2 discernible, the standard is also not judicially
3 manageable. First, the partisan symmetry that they've
4 relied on has not been endorsed by the Supreme Court as
5 the plaintiffs intimate. In the *LULAC* case, Justice
6 Kennedy -- his quote was -- he said he considered
7 partisan symmetry and he would not altogether discount
8 its utility. I mean that's a pretty weak praise of
9 partisan symmetry. And Souter and Ginsburg also said
10 they just would not rule it out as a criterion for a
11 test. But Scalia, Thomas, Alito, Roberts were not on
12 board with this partisan symmetry and Kennedy was quite
13 weak and pointed out some of the problems with it.

14 I think the main problem with it though is it
15 doesn't actually measure gerrymandering and there's no
16 -- the problem with this test is what is a gerrymander.
17 It's easily thought of as just ignoring traditional
18 districting principles to benefit a party. Elbridge
19 Gerry's Salamander, that was very oddly shaped to
20 benefit his party.

21 The plaintiffs' standard just starts from the
22 assumption that any system that benefits one party to a
23 certain extent is a gerrymander, which isn't necessarily
24 the case. Given that the Supreme Court has recognized
25 that the concentration of voters, and this is just a

1 common sense proposition, the geographic location of
2 your voters matters in terms of converting statewide
3 vote totals into seats; that groups that tend to be
4 concentrated in particular areas, any sort of geographic
5 districting will disadvantage those groups because you
6 can run up a 90-to-10 vote total in five different
7 districts and it gives you a big statewide vote total,
8 but it can't possibly translate into more seats even if
9 you get that up to 95 or drive your turnout so that 95
10 percent is a bigger share of the state pie, it just
11 doesn't yield more legislative seats.

12 And this is why the Court -- why their plan sort of
13 erroneously detects the court-enacted plan from 2002 as
14 a gerrymander. A 3-judge panel in that case
15 specifically stated that they couldn't enact a plan that
16 had sort of symmetry because of the concentration issue
17 in Wisconsin. They recognized that issue.

18 JUDGE CRABB: Did they have experts to help
19 them with that question?

20 THE COURT: There were many experts in the 2002
21 case and both -- the way that case went, from reading
22 the opinion, was that there was a Republican plan
23 submitted and a Democratic plan submitted and there was
24 experts that testified on behalf of both of those plans.
25 And then the Court ended up drawing its own plan based

1 on its own ideas of what should be done. But there were
2 experts who testified about the strengths.

3 JUDGE CRABB: Experts helping the court draw up
4 its plan as far as you know?

5 MR. KEENAN: I don't think the Court retained
6 its own expert.

7 JUDGE CRABB: Why do you think that the
8 efficiency gap is not a judicially cognizable manageable
9 standard?

10 MR. KEENAN: I began to explain this. Because
11 it doesn't actually measure gerrymandering, it just
12 measures different political outcomes that could be the
13 result of nothing to do with gerrymandering. Wisconsin
14 has had --

15 JUDGE CRABB: If the intent is as easy to prove
16 as you seem to suggest it is, I think that's legitimate.
17 Then you measure a gap.

18 MR. KEENAN: Well, I think the problem is if,
19 for example, the 3-judge panel that did the 2000s plan
20 wasn't intending to benefit either side and it ended up
21 benefiting one side according to their test. So under
22 their test that would be a gerrymander. Well, the
23 result of that wasn't because of gerrymandering, it was
24 just a result of the underlying dynamics of where people
25 are located in the state. And so if a test is finding

1 gerrymandering where it doesn't exist, then it's not
2 really a valid test for gerrymandering.

3 The flip side is that it could fail to detect
4 gerrymandering where it does exist. For example, the
5 Illinois -- recent redistricting in Illinois was
6 controlled by Democrats and there was a lawsuit brought
7 to a district court just like this alleging a partisan
8 gerrymander. It was dismissed, but then when I looked
9 at Mr. Jackman's calculations for Illinois, it actually
10 shows one of those years was a Republican efficiency gap
11 under a Democratic gerrymander. That was controlled by
12 Democrats. I don't think they were trying to benefit
13 the Republicans with the plan they enacted, it was just
14 probably the limits of what they could do in terms of
15 benefiting their own party ended up with a
16 pro-Republican plan. It's not showing gerrymandering,
17 it's just showing different outcomes.

18 JUDGE CRABB: As I understand the plaintiffs'
19 plan, it would require a showing first of intent. If
20 there weren't any intent shown, it wouldn't go any
21 farther. Then if the efficiency gap showed a sizable
22 gap, then it would be left to the state. The state
23 would have the opportunity to show that there were
24 reasons that explained the efficiency gap that had
25 nothing to do with any intent to benefit one party or

1 another, which is pretty much what you're saying when
2 you say well, the Court -- after the Court held the
3 hearing in 2012 redistricting and then it made up its
4 own map and it ended up with a result that was favorable
5 to the Republicans, you wouldn't say that was
6 gerrymandering because the Court had done it and it had
7 no intent to do it in favor of one party or another.

8 MR. KEENAN: Yeah. But I think it's passing
9 the buck on the difficult questions in these cases to
10 the people who are, like, by constitution and statute
11 authorized to enter a plan to justify it, which is --
12 the problem with these plans is -- the problem with
13 these claims is mixing all the different elements of
14 districting principles with political results, with
15 one-person, one-vote Voting Rights Act. It's a very
16 difficult exercise. In fact, there's probably an
17 infinite numbers of lines you could draw for a state.

18 And the plaintiffs are essentially saying well,
19 defendants, you have to -- now you have to decide. You
20 have to justify everything. The hard part is on you.
21 Where the Supreme Court is putting the -- rightly
22 putting the burden on people who are challenging a plan
23 enacted by legislators who were elected by the people
24 and a governor enacted by the people. They're
25 challenging a duly enacted law they should have the

1 burden of proving that it's unconstitutional instead of
2 kind of foisting that burden on defendants. But
3 anyways, their test isn't managed --

4 JUDGE RIPPLE: Let's talk burdens of proof for
5 a moment. In paragraph 10 and again in paragraph 78,
6 the plaintiffs assert in their Complaint that the plan
7 is at least subject to or might be salvaged by your --
8 by a demonstration that traditional tools of
9 redistricting had been used or that the bands of the
10 state's geography require a particular line drawing.
11 Who has, in your view, the ultimate burden on this
12 issue? The plaintiffs or you?

13 MR. KEENAN: The plaintiffs would -- in our
14 view, the plaintiffs would have to have the burden of
15 proving that a duly enacted law was unconstitutional and
16 it wouldn't be on the -- the burden wouldn't --

17 JUDGE RIPPLE: The League of Women Voters
18 against Chicago case, Judge Cudahy said that that issue
19 wasn't part of the plaintiffs' prima facie case, and
20 that raises the question as to whether it's a true
21 affirmative defense or whether it's a question upon
22 which you have the burden of perhaps going forward,
23 placing in issue the fact that there was another reason
24 for drawing lines where they were drawn, and that then
25 the burden switched, shifting back to the plaintiff to

1 prove their case to rebut, in effect, what you have
2 placed on the table. I gather that you think the latter
3 is the way this ought to be done.

4 MR. KEENAN: Yeah -- yes, although I think it
5 really shouldn't get to that point in any event because
6 the efficiency gap is sort of an arbitrary number that
7 has no basis in, like, reality and the plaintiff
8 shouldn't be able to bootstrap, like, this number
9 they've created into making the defendants prove the
10 constitutionality of the plan. And further, that
11 there's really no guidance provided as to how the
12 defendants are supposed to prove that. I mean what are
13 we going to prove? They use the word necessary, that
14 it's necessary. Well, frankly nothing is necessary in
15 districting. You could draw a million different lines
16 and probably justify them just as easily. I would guess
17 it's always hypothetically possible to do different
18 lines that result in different efficiency gaps.

19 JUDGE RIPPLE: Justice Kennedy in the *Vieth*
20 case says that they have to show that the plan impairs
21 fair and effective representation and that a political
22 burden has been placed on the residents. That's a --
23 that's a burden that -- how would they meet that burden?
24 How would a hypothetical plaintiff meet that burden?
25 Somebody -- what would you do if not what they ask?

1 MR. KEENAN: Well, I think you'd have to
2 develop some sort of constitutional theory as to what
3 fair representation is required. Because right now
4 we're dealing with what is fair and what is unfair.
5 Well, what's fair to one person might not be fair to
6 another person and I don't know what is a fair level of
7 representation. That's the first question. That's what
8 Justice Kennedy is asking is one, development of
9 districting principles.

10 JUDGE RIPPLE: Does *Bandemer* help at all on
11 that?

12 MR. KEENAN: At this point I think that part of
13 *Bandemer* has been overruled by *Vieth*, but they said,
14 like, just not getting enough of the -- enough seats
15 corresponding to your votes was not enough. It had to
16 have -- I'm forgetting the term they used -- but they
17 had a standard that had never been met from the time it
18 was announced until *Vieth*.

19 JUDGE RIPPLE: What do you think is the role,
20 if any, of -- what entrenchment in this -- that word --
21 you see that word or words like it in *Bandemer* and you
22 see it in some of the circuit opinions. It seems to
23 indicate that something more than one electoral cycle
24 has to be shown. Does historical entrenchment have
25 anything to do with whether a plan is constitutional or

1 not?

2 MR. KEENAN: Well, various justices have
3 suggested that. It would be difficult to show that
4 though in practical -- in practicality in that each plan
5 only have five elections underneath it and if you're
6 going to rely on past election results, perhaps the
7 earliest you could challenge it would be after the first
8 election. But then maybe that's not enough information
9 to know whether this plan is truly entrenching someone.

10 JUDGE RIPPLE: You mean districting could be
11 shown to perpetuate entrenchment that had occurred
12 earlier?

13 MR. KEENAN: I suppose, although that seems to
14 lose its force when the entrenchment was done by federal
15 courts. I wouldn't think that they were intending to
16 entrench Republicans in power, although that's sort of
17 been the result in Wisconsin. At least every election
18 since 199 -- since the 1994 election, the Republicans
19 have won the State Assembly in every election other than
20 one, which was in 2008, which was a very good year for
21 Democrats. President Obama, I believe, won 57 percent
22 of the vote or something. And in that year, the
23 Democrats won I think 51 seats, so they barely got over
24 the majority, and that's in a historical good year for
25 them. Of course they promptly lost it back in 2010

1 where the Republicans then won 60 seats. And those were
2 all under court plan. So I don't see that there's a
3 problem with one party entrenching itself. And even if
4 there is, there's a remedy there and winning -- for
5 example, the State Senate, which hasn't been challenged.
6 The Democrats have controlled that through various
7 times. And then also the governor is elected statewide.
8 The state can't be gerrymandered. So there's always the
9 ability to win the governors's race, in which case that
10 would stop one party from controlling the districting
11 process.

12 At this point, the plan will only be in place for
13 2016, 2018, 2020. At that point there will be another
14 census and another redistricting plan, at which point we
15 can't say who will enact that plan, whether it will be a
16 court; it could be the Republicans again; it could be
17 Democrats; it could be, like, the parties actually
18 agree, you know, they split control, but they agree on a
19 plan. Perhaps unlikely, although in researching this, I
20 saw that there's even some plans where one party
21 controlled and they couldn't agree themselves on a plan
22 and it went to the courts anyway. So you can never be
23 quite be sure what's going to happen.

24 JUDGE CRABB: If you want to save five minutes
25 you better stop.

1 MR. KEENAN: Okay. I'll stop.

2 MS. ODORIZZI: Good afternoon. May it please
3 the Court, Michelle Odorizzi for the plaintiffs. I
4 think going back to first principles, we have to look at
5 the three Supreme Court decisions and say that they
6 absolutely recognize that it is unconstitutional to have
7 excessive partisan gerrymandering. And the problem has
8 been how do you draw the line between partisan
9 gerrymandering that is excessive and hence
10 unconstitutional and politics as usual. And that in all
11 the cases is -- there's a cause of action there, but the
12 court is hunting for a standard, and as I say, a
13 standard that is related to constitutional rights and
14 that's judicially manageable. And we think we've come
15 up with a standard like that in this case and it's based
16 on a concept of not proportional representation but
17 rather the concept of partisan symmetry which is simply
18 that the electoral system should treat voters' adherence
19 of both parties in a similar manner and not treat them
20 in a different manner.

21 So partisan symmetry focuses not on how many seats
22 you get for your statewide vote but rather on what kind
23 of cracking and packing has been done because that's how
24 you do a partisan gerrymander. You pack all of the
25 opposing parties' adherence into districts where you can

1 and where you can't do that, you crack them so that
2 they're distributed and can't make a difference.

3 And the efficiency gap is a way of measuring that
4 by looking at how many votes for each party were wasted;
5 they weren't necessary to elect the person in the
6 particular district. And what they found in the first
7 two election cycles under this plan is that you have an
8 extraordinarily high efficiency gap. We've compared it.
9 Our expert has compared it to statehouse races in the
10 modern era over 40 years. And if you put it on a curve,
11 it is way far out on one side. It's an outlier. And
12 our expert has looked at that and said not only is it an
13 outlier, it's big on the absolute terms. It's an
14 outlier in relative terms. And he also has opined that
15 it's likely to be extremely durable. So even if people
16 change their minds, even if people change their votes,
17 even if you get out more votes during the ten years of
18 this cycle, it's not likely to change from a Republican
19 plan.

20 JUDGE GRIESBACH: There are four more years,
21 five more years left of this cycle, and Mr. Keenan just
22 pointed out things that can change. You win a
23 governor's race in a statewide election or you win the
24 Senate, which is not the --

25 MS. ODORIZZI: You're right, Your Honor, but

1 that doesn't change who you have in the Assembly.

2 JUDGE GRIESBACH: Right. But that means it's
3 going to be thrown to the courts unless you get a
4 veto-proof majority with the governor's seat or if you
5 win a senator seat, you either hold out, get a
6 compromise or it's thrown to the court, which, of
7 course, by definition, I think you assume is not a
8 political partisan gerrymander.

9 MS. ODORIZZI: That's right, Your Honor.

10 THE COURT: That is -- it's not -- that is one
11 way of dealing with it without the courts becoming
12 involved; correct?

13 MS. ODORIZZI: It is one way to say well, we
14 can just wait a decade.

15 JUDGE GRIESBACH: It's not a decade anymore.

16 MS. ODORIZZI: Well, it's not anymore. But if
17 you say a partisan gerrymandering that there's no way to
18 control it by this type of analysis, then legislatures
19 will just do it to the nth degree. They have the tools
20 to do it. They will maximize their advantages, and then
21 they will have a decade during which legislative bodies
22 are gerrymandered in one area and not reflecting the
23 will of the people. That's the problem with it of just
24 having courts say no. And Justice Kennedy, after all,
25 who was -- four justices would love to say it's not

1 justiciable. Let the political system handle it. But
2 Justice Kennedy isn't willing to throw the towel in yet.
3 He thinks that there might be a way of doing it and he
4 did open the door at least to this idea of partisan
5 symmetry, which is what our efficiency gap is based on.

6 JUDGE RIPPLE: But isn't it different? The
7 partisan symmetry and scholars have talked about that
8 too.

9 MS. ODORIZZI: It's actually -- I think there
10 are actually three things at issue here. The concept is
11 partisan symmetry, which is you have to treat everybody
12 in the electoral system more or less equally. Not
13 perfectly equally, but more or less equally. Partisan
14 bias is a metric of partisan symmetry, so it's an
15 expression of it. And that's what they were talking
16 about in the *LULAC* case. Partisan bias, which is
17 calculated in a different way and it's kind of a
18 hypothetical calculation of what -- how many seats would
19 you get if you had a 50/50 vote. And Justice Kennedy
20 said there's a lot of things I don't like about partisan
21 bias, and he listed them. We have the efficiency gap is
22 different. It's not hypothetical. It's based on what
23 the actual votes were. And we've articulated in our
24 brief, I think, why we think it meets the objections
25 that Justice Kennedy had to partisan bias.

1 So it's a way of looking at the concept of partisan
2 symmetry, the idea of equal treatment of people and not
3 disparate treatment based on their political beliefs,
4 which is what the Equal Protection Clause prohibits.
5 It's a way of measuring that, and measuring cracking and
6 packing, which is how you do partisan gerrymandering, so
7 that you can look at it and look at it in historical
8 context and say is this too much.

9 JUDGE GRIESBACH: Isn't a significant problem
10 though just the fact that the Democratic votes are
11 naturally packed as sometimes they are or concentrated
12 in the urban areas? So absent some kind of careful
13 manipulation and study of voting practices, if you
14 create districts without regard to partisanship at all,
15 aren't you going to naturally end up with a result that
16 would have a significant gap, efficiency gap?

17 MS. ODORIZZI: I don't think so, Your Honor.
18 First of all, I'm not sure that you can ever kind of
19 just draw a random map. So you say well, you pay
20 attention to everything else and you don't look at this.

21 JUDGE GRIESBACH: You have to pay attention to
22 population.

23 MS. ODORIZZI: Population, right.

24 JUDGE GRIESBACH: You have to pay attention
25 also to minorities, voting rights.

1 MS. ODORIZZI: Right, right. But --

2 JUDGE GRIESBACH: Now you're adding another
3 matter to pay attention to. In order to accomplish the
4 result you're talking about which is an acceptable level
5 of partisan -- of efficiency gap, don't you have to
6 study those voting patterns and, in fact, create a
7 manipulated district so you will avoid the efficiency
8 gap that you're decrying today?

9 MS. ODORIZZI: You may have to, Your Honor,
10 because we know that --

11 JUDGE GRIESBACH: It's not enough not to let
12 partisanship enter the picture. You have to actually --

13 MS. ODORIZZI: Take account of it.

14 JUDGE GRIESBACH: -- take account of it.

15 MS. ODORIZZI: So that you are treating people
16 equally.

17 JUDGE GRIESBACH: You're treating them
18 differently because you're taking into consideration the
19 Democratic voters are all in one place and the
20 Republicans are more disbursed.

21 MS. ODORIZZI: Well, Your Honor, there are an
22 infinite number of maps you can draw, and what this case
23 shows and our allegations show is that when you put a
24 map-making process in the hands of politicians, they're
25 going to look at the political impact of it.

1 JUDGE GRIESBACH: So we're going to put the
2 map-making process in the hands of academic instead of
3 politicians.

4 MS. ODORIZZI: No, I think it's perfectly fine
5 for politicians to do it. The problem is here and the
6 interesting part about -- it's all alleged in our
7 Complaint what the Legislature did here is they didn't
8 just engage in cracking/packing, they hired a political
9 scientist who looked at and forecast what was going to
10 happen in every district. And so to see did we really
11 pack and crack those Democrats so that we will get a
12 maximum Republican result and he was remarkably
13 accurate. If we take what he did and apply our
14 efficiency gap to it, he predicted it to a tee 12
15 percent.

16 JUDGE CRABB: Can I ask you something about the
17 efficiency gap? It seems to me that the two experts
18 measure that in two different ways.

19 MS. ODORIZZI: They arrive at a result
20 differently. Professor Mayer actually did it by looking
21 at a district by district -- every district he saw what
22 the differences were. What's the gap in a particular
23 district and he added them all up. So he really did it
24 from the ground up.

25 Professor Jackman did kind of a shortcut because he

1 was doing them with, you know, statehouses over 40 years
2 and he applied a consistent methodology. So he did a
3 shortcut, but he's measuring the same thing. And we
4 believe that if you look at it, you'll see you can't do
5 it on a motion to dismiss. But we think if you looked
6 at it at trial, you would see that the methodologies
7 mesh and that they are measuring, in fact, the very same
8 thing. I think that's a question of fact.

9 JUDGE RIPPLE: When you spoke about the experts
10 earlier, you didn't mention that they had addressed the
11 issue of durability.

12 MS. ODORIZZI: Yes.

13 THE COURT: Can you please tell me what role
14 you think durability plays in the analysis.

15 MS. ODORIZZI: Well, I think the *Bandemer* court
16 talked about a sustained impact, looking at the specific
17 language.

18 JUDGE RIPPLE: I'm familiar with *Bandemer* --

19 MS. ODORIZZI: Right.

20 JUDGE RIPPLE: -- and other courts have talked
21 about it as well.

22 MS. ODORIZZI: Right.

23 JUDGE RIPPLE: I'm trying to see how your
24 particular approach to the problem speaks to durability.

25 MS. ODORIZZI: Well, it does, Your Honor,

1 because what our expert says, and again, this is expert
2 testimony that, of course, has to be taken as true on a
3 motion to dismiss.

4 JUDGE RIPPLE: Exactly.

5 MS. ODORIZZI: But what our expert says is that
6 looking historically, you can predict with a high level
7 of accuracy that this map is going to stay a Republican
8 map. It's very durable for the entire election cycle no
9 matter that you have population changes, no matter that
10 you may have ticket splitters, no matter that you have
11 some people changing their affiliation.

12 JUDGE RIPPLE: So therefore it would be
13 relevant to Justice Kennedy's two points of fair and
14 effective representation --

15 MS. ODORIZZI: Yes.

16 JUDGE RIPPLE: -- as well as to extent or depth
17 of political burden.

18 MS. ODORIZZI: Exactly, Your Honor. I think
19 that's exactly right. So we have all of those things.
20 We have intent to create this partisan political
21 advantage, absolutely accomplish the intent, and did it
22 in a way that is off the charts historically, that is
23 going to be highly durable, and we say that creates at
24 least a presumption that this is an unconstitutional --
25 that this is the excessive partisan gerrymandering. And

1 then if the state wants to come back and say no, no, no,
2 it was necessary, there's no other way to do it, it had
3 to be this, they can because of the political geography
4 of the state.

5 But we have a report from Professor Mayer who's
6 created a map that is as good or better than the current
7 map in all of the traditional redistricting terms. It
8 may be even a little better on some measures and it has
9 a 2 percent efficiency gap.

10 JUDGE CRABB: As I understand it, the proposed
11 plan assumes that the districts are contested and that
12 there are no incumbents. And I want to know why those
13 assumptions are necessary and do they skew the results.

14 MS. ODORIZZI: Right. They had to make certain
15 assumptions on where you have uncontested races in
16 actuality about what you would get if there were
17 contested races. So Professor Jackman, Professor Mayer,
18 they do make certain assumptions looking at what is
19 happening in that same election about if you had a
20 contested race, how many wasted votes you would have.
21 Because otherwise you would be skewing the analysis by
22 saying well, if there was a Democrat running
23 uncontested, all of the Democratic votes practically are
24 wasted because they're unnecessary to elect that person.
25 They only need one vote.

1 So that's something that the political scientists
2 do. And again, I think that's an issue for a trial, not
3 for a motion to dismiss.

4 JUDGE RIPPLE: If I could ask you to address
5 something I know has puzzled me. In your papers you
6 talk about, pardon me if I don't use your exact
7 language, a victory margin; that the prevailing party
8 should win some more seats than the votes garnered I
9 gathered. You don't quite tell us why and I must say
10 I'm dumbfounded. I really had difficulty following that
11 discussion.

12 MS. ODORIZZI: Well, Your Honor, I think if
13 you're talking about whether we're trying to distinguish
14 between proposal representation and partisan symmetry,
15 the fact is that you can have plans that have efficiency
16 gaps that nevertheless aren't going to lead to
17 proportional representation. And you can have gap or
18 plans where you have proportional representation so that
19 your seat -- number of seats is the same as your
20 percentage of the statewide vote but yet they do have an
21 efficiency gap. So the only point we were trying to
22 make is that the efficiency gap, the concept of partisan
23 symmetry is not the same as the kind of more simplistic
24 notion that, you know, if you get 60 percent of the
25 statewide vote, you'll have to get 60 percent of the

1 seats. We don't think that's the case. There is no
2 constitutional principle. Our view is you just have to
3 be treated fairly in the system and the system can't be
4 rigged against you structurally so that more of your
5 votes are wasted than the other side's votes.

6 I don't know if I answered your question or not.

7 JUDGE RIPPLE: You came closer than the written
8 material, yes.

9 JUDGE CRABB: Do you think that the
10 redistricting in this case, the problems are more severe
11 than the ones that were at issue in *Bandemer* and *Vieth*
12 and *Radogno* or do you think they are just better tools
13 now for assessing a constitutional violation?

14 MS. ODORIZZI: Well, I think, Your Honor, in
15 *Bandemer* the court said -- I think Justice White said we
16 can't be sure this is going to endure. We really don't
17 know if this is kind of an artifact that we had one
18 election cycle. And I think that here we do know and so
19 we do have better tools now to analyze it. In the other
20 cases, they had not gone through this kind of analysis
21 and, in fact, the whole idea of partisan symmetry which
22 was raised in *LULAC* was really raised by an amicus and
23 they calculated a partisan bias. But it really wasn't
24 the test that the plaintiffs were putting forward. So
25 it didn't get the kind of vetting that we hope this

1 court will give us by having a trial of the case.

2 So I think it's hard to tell going backwards what
3 they would do, how the Court would have reacted to this.
4 All we can say is that they haven't said it's not
5 justiciable. They haven't said that it's constitutional
6 to have excessive partisan gerrymandering, and they've
7 left the door open to this precise type of concept and
8 now we've come forward with a metric that we think is
9 manageable and it's logical, it's similar to the
10 one-person, one-vote cases in terms of figuring out what
11 a cutoff is. It didn't force everybody to have kind of
12 the platonic ideal of perfect symmetry. It allows a lot
13 of play in the joints, but it would enable the court to
14 strike down the kind of gerrymandering that we think is
15 at issue here that's really extreme.

16 And I just wanted to say something about the
17 court-ordered plan because I think counsel misspoke when
18 he said that the court looked at partisan issues. It
19 did not --

20 JUDGE CRABB: It did not.

21 MS. ODORIZZI: -- in the 2000s plan. In the
22 1990 plan, I think the court really did try to avoid any
23 partisan tilt in it. It succeeded. In 2000, the court
24 was more interested in just fixing the skewing of the
25 numbers that had happened through population shifts and

1 it really didn't look at this question of what's going
2 to be the impact on this in terms of partisanship. It
3 looked a little bit at incumbency because people
4 complained that they were pitting two incumbents against
5 each other, and the court fixed some of that. But it
6 really wasn't conducting this kind of analysis.

7 And if you look, I think it's page 72 of our filing
8 of our Complaint, you will see it gives Wisconsin's --
9 the Assembly's efficiency gap over the years and you
10 will see that the efficiency gap from the quarterly plan
11 of the 2000s is kind of all over the lot, and at the
12 end, in the last election, in the 2010 election, it was
13 pretty small, the efficiency gap was. And what happened
14 then from the redistricting that the Republican
15 leadership did, with the idea again of creating a very
16 large efficiency gap, they didn't call it that, but of
17 having that resolved, there's a very big swing and that
18 to us is the essence of partisan gerrymandering.

19 Your Honor, asked a question about standing that
20 I'd just like to address briefly. We only have voters
21 from certain parts of the state. If the court thought
22 that this was an issue that should be done more
23 statewide, we could turn it into a class action. We
24 could add more plaintiffs. And we would want to amend
25 our complaint if the court thought that was an issue.

1 But we would point out that in the Supreme Court
2 cases, the courts did not -- those were all statewide
3 gerrymandering cases and the majority did not strike
4 them down and say well, you cannot do that. Instead you
5 have to have specific districts. And this really is a
6 different kind of situation than the racial
7 gerrymandering cases where you're talking about a
8 specific district line. Here the impact is statewide.
9 The efficiency gap only makes sense statewide.

10 In *Vieth*, it's true that you had a couple of the
11 dissenters talk about partisan gerrymandering on a
12 district basis, but that was more yes, we would do that,
13 than boy, there's no way that you could possibly do this
14 on a statewide basis. So we think that that's a little
15 bit of a red herring.

16 If the Court has no more questions, I'll just end
17 with a plea that what we're seeing today, and I think
18 the expert reports support it, is a historic level of
19 partisan gerrymandering all over the United States. It
20 is at levels that you've just never seen in 40 years.
21 And if the courts look at this and say well, there's
22 really nothing we can do about it, there's no way we can
23 deal with it, that is just going to go on and on and
24 eventually it is going to disrupt not only the rights of
25 people to be treated equally as voters, but also basic

1 principles of constitutional democracy.

2 So we would ask the Court to please deny the
3 motion, let us have a trial, figure out what the facts
4 are here, and then however the case comes out, we see
5 what happens at the next level.

6 JUDGE RIPPLE: I hate to ask a question after a
7 conclusion like that, but --

8 MS. ODORIZZI: That's fine, Your Honor.

9 JUDGE RIPPLE: -- I do have one. The same
10 question I asked your brother a few moments ago, and
11 that is, with respect to the possibility of these
12 traditional tools of gerrymandering or geographical
13 necessity, the cases seem to indicate that they have
14 some sort of a burden of introducing those. But I
15 wonder is it a burden of simply placing them at issue or
16 is it an absolute affirmative defense that they have to
17 establish?

18 MS. ODORIZZI: I think, Your Honor, under our
19 test as we've proposed it, once we show that you have
20 this intent, the big efficiency gap, durable efficiency
21 gap, the burden shifts to them to show that it was
22 really necessary in order to achieve other goals, just
23 like you would in one-person, one-vote cases. You can
24 go over 10 percent, but you have to show it was really
25 necessary.

1 Now, Your Honors obviously can fiddle with that
2 burden. We think we've met it and that we could meet it
3 and that we could show it was not necessary. But
4 whoever has the burden, I think the question at the end
5 of the day has to be is the gerrymander here, is it
6 necessary in light of these other issues, Voting Rights
7 Act issues, political subdivisions, all of those things
8 that are normal. And again, we have done a plan that
9 meets all of those at least as well and we think better
10 in some ways than the current plan and still has only a
11 2 percent efficiency gap.

12 Thank you. Oh, I'm sorry, Your Honor.

13 JUDGE CRABB: You still have time, so I'm going
14 to use it up. You argued in your brief that the right
15 at issue is the constitutional right to equal treatment
16 in the electoral system; the right not to be treated
17 differently based on the voters' political beliefs, and
18 that a necessary consequence of that right is that both
19 major parties should be able to translate their popular
20 support into legislative representation with
21 approximately equal ease, and I think that sounds
22 terrific. But I can't see that the Supreme Court has
23 ever recognized that right, and, in fact, it seems to me
24 from the cases that I read that it has rejected that as
25 a right.

1 MS. ODORIZZI: Well, Your Honor, I think going
2 back, what I said at the beginning, excessive partisan
3 gerrymandering is -- I think the court unanimously has
4 said it is unconstitutional. So you have to kind of
5 look at well, why is it unconstitutional. And I think
6 the reason is because you can't treat voters differently
7 based on their political beliefs. And we think the
8 corollary of that is if you're putting -- if you're
9 packing and cracking voters because you perceive them to
10 be Democrats, that that can't possibly be
11 constitutional. So the expression of that, we've kind
12 of turned that around so if you look at the other end of
13 the telescope, what that tells you is you have to -- the
14 system has to treat people more or less equally in terms
15 of their opportunity to turn their votes into seats.
16 And so I guess, you know, maybe that's the missing step
17 because when you crack and pack adherence of your
18 opponent's party the way they did in this case, you are
19 really discriminating against them based on their
20 political beliefs and diluting their voting power based
21 on your desire to entrench yourself.

22 JUDGE CRABB: But isn't that what was done in
23 *LULAC* and --

24 MS. ODORIZZI: I think it was, yes, Your Honor.
25 But again, in those cases what the court said was

1 missing is you can do a little bit of that, and that's
2 the problem. You can do some of it. The question --
3 when it becomes excessive, it's unconstitutional. So
4 the problem is just how do we draw that line between
5 what we accept as being just part of the political
6 system and the fact that we have legislatures draw these
7 lines who have conflicts of interest, of course.

8 JUDGE CRABB: It's sounding a lot like the
9 standards for pornography.

10 MS. ODORIZZI: How do I know it when I see it.
11 Yes, Your Honor. But here I think, and what the court
12 is looking for, what Justice Kennedy is clearly looking
13 for, is somebody come up with a metric, a standard that
14 I can look at and not be making arbitrary decisions on.
15 And we think that we've come up with one. You can't
16 decide it all in one shot. But like the one-person,
17 one-vote cases, it's the kind of thing that can be
18 decided over time as you get one case and maybe another
19 case and another case and hopefully then we won't have
20 the need for a whole lot of more cases because
21 legislators will restrain themselves and not try and
22 engage in this activity to this extent where the
23 political system just can't cure itself because it's
24 structurally biased against a particular group of
25 voters.

1 Thank you.

2 JUDGE RIPPLE: Thank you, Counsel.

3 Mr. Assistant Attorney General, you have reserved five
4 minutes.

5 MR. KEENAN: Yeah, I will just address a couple
6 of points. To the burden of proof, burden of production
7 question, I think -- I haven't seen it in the post-Vieth
8 world and the plaintiffs didn't point out any case that
9 survived past a motion to dismiss where this has come
10 into play. So I don't -- I think the answer is that we
11 never get to that point because the case gets dismissed.

12 Secondly, the efficiency gap --

13 JUDGE GRIESBACH: Do you have any cases that
14 involve this same type of expert report?

15 MR. KEENAN: I don't -- none of the efficiency
16 gap expert reports. I'm not sure if they involved --

17 JUDGE GRIESBACH: This is new --

18 MR. KEENAN: This is new, yes.

19 JUDGE GRIESBACH: -- I thought.

20 MR. KEENAN: Professor Mayer's efficiency gap,
21 which is like a district-by-district calculation, is not
22 just the actual votes. There's various adjustments that
23 are made to them, which Judge Crabb pointed out one of
24 them is for uncontested seats, which seems reasonable.
25 The other one is incumbency they adjust for, which I

1 don't know if that's appropriate. I mean the incumbents
2 are running, and if there is an advantage there, that's
3 affecting the vote totals. Perhaps it's a reason to
4 back it out, but perhaps it's not. But it isn't actual
5 votes.

6 JUDGE GRIESBACH: Perhaps you need an expert to
7 let us know.

8 MR. KEENAN: No. I think you could say that
9 that's just a sign that it's not a manageable standard.
10 But the reason -- and where does -- you were asking some
11 questions about the vote curve and, like, where does
12 that come from. From my -- my reading of the Jackman
13 report is that that's the way things have happened in
14 the past. Like looking at past elections, this is how
15 things tend to happen. But it's a very nice perfect
16 curve which would show that it's not actually real, it's
17 just an average of a bunch of things that you put
18 together. But obviously an average is made up of things
19 below that, things above it. So the fact that you
20 happen to be one of the people that's below that curve
21 or above that curve shouldn't seem to be an indication
22 that it's unconstitutional because it's not in
23 accordance with elections that happen in other
24 jurisdictions that have different districts and
25 different populations and things.

1 Going to the durability question, it isn't
2 impossible for districts to flip back and forth between
3 Democratic and Republican districts. I looked at the
4 plaintiffs' Complaint. They go through a number of
5 examples of alleged cracking and packing where they say
6 well, in Kenosha you did this in District 26 and
7 District 27, and in Brown County and Manitowac County
8 you did this.

9 Now, they say that in the 2008 election the
10 Democrats won this many seats and the Republicans won
11 this many seats. So I decided to look at the 2010
12 election how those fared. Of the 20 seats that were
13 "Democratic seats," nine of them were won by Republicans
14 in the 2010 election. I mean it shows that these seats,
15 particularly ones that are, like, maybe a 55/45, 52/48,
16 something like that, can go back and forth depending on
17 the candidate, depending on the year, depending on who
18 knows what. Wisconsin has had very high turnout
19 elections lately in state law, very high profile issues.
20 The voters are paying attention and candidates could win
21 and lose based on these issues. So I don't think we can
22 say that this is durable and that a Republican seat
23 can't go to a Democrat or a Democrat seat can't go to
24 Republican. I mean some of them are going to be hard,
25 in Milwaukee or Madison or Waukesha or somewhere like

1 that. But a lot of them, they could go either way
2 depending on the candidate, depending on the issues,
3 depending on the year, so the economy, things like that.

4 JUDGE RIPPLE: That's something that should be
5 established in a factual nature, none of them are
6 speculating --

7 MR. KEENAN: Yes. Although frankly --

8 THE COURT: -- on the availability of a blind
9 drawing?

10 MR. KEENAN: But in any event, you're always
11 going to be speculating as to what's happening in the
12 future and we just can't know what the election is going
13 -- what's going to happen in the 2016 election. Do we
14 know which presidential candidate will win Wisconsin? I
15 don't think anybody could know that right now. I don't
16 think anyone can know what governor candidate is going
17 to win the 2018 election. Who knows what the issues
18 will be and what will be important to voters and which
19 side will turn out, which side won't turn out. It's a
20 lot of speculation about the future.

21 In terms of the comment that the gerrymandering in
22 the past two elections is unprecedented, if you look at
23 Mr. Jackman's report on page 75, Figure 36, you notice
24 that a lot of the efficiency gaps are on the left side,
25 which is pro-Republican. But a lot of these states have

1 pro-Republican efficiency gaps where they don't have
2 Republicans enacting the plans. For example, Minnesota
3 was a court-enacted plan. They're right on the border
4 of unconstitutional. Missouri has one that's about 12
5 percent it looks like. That was a court plan. Kansas
6 is both years over 10 percent. That's the side that had
7 a court plan even though Republicans controlled
8 everything. There's a fight between moderate and
9 conservative Republicans. New York shows up as a bad
10 state. One of them looks to be 13 percent, one of them
11 is 8 percent. New York is controlled by Democrats.
12 They're not districting to benefit Republicans.

13 The fact is it's not all gerrymandering. It's just
14 the underlying nature of these districting decisions.
15 If your test is finding all these court plans and
16 Democrat plans to be gerrymanders; for example, I
17 mentioned Illinois has one where that's a
18 pro-Republican, and Iowa, which is often held up as a
19 mile of districting because they use neutral
20 commissions, one of theirs has a -- looks to be like a 7
21 percent efficiency gap for one of the years at least. I
22 think that shows that when you refer to partisan tilt,
23 what does that mean? What does that mean? If a perfect
24 districting body could come down and district and it
25 ended up 6 percent pro-Republican, was that a partisan

1 tilt that's unfair or is that just the nature of the way
2 it should be? And then are you actually gerrymandering
3 when you go back to a zero percent tilt because you're
4 ignoring districting principles to get it to symmetry?
5 It's hard to say and it's one of the reasons why the
6 Court has just not been able to develop any sort of
7 standards for this and frankly why this court and this
8 case should be dismissed.

9 JUDGE RIPPLE: Thank you, Counsel. The Court
10 will take the motion under advisement and expresses its
11 deep thanks to both attorneys for very fine oral
12 arguments today. We very much appreciate the
13 illumination and help. The Court will rise until the
14 time and place appointed by law.

15 (Proceedings concluded at 2:36 p.m.)

16 * * * * *

17 I, LYNETTE SWENSON, Certified Realtime and
18 Merit Reporter in and for the State of Wisconsin,
19 certify that the foregoing is a true and accurate record
20 of the proceedings held on the 4th day of November 2015
21 before the Honorable Barbara B. Crabb, Honorable Kenneth
22 Ripple and Honorable William Griesbach, the Western
23 District of Wisconsin, in my presence and reduced to
24 writing in accordance with my stenographic notes made at
25 said time and place.
Dated this 12th day of November 2015.

23 /s/
Lynette Swenson, RMR, CRR
24 Federal Court Reporter

25 The foregoing certification of this transcript does not
apply to any reproduction of the same by any means

1 unless under the direct control and/or direction of the
2 certifying court reporter.
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25